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No. 2450

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, her Guardian,

Plaintiffs in Error,

vs.

PUGET SOUND ELECTRIC RAILWAY, a Corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR AND MOTION TO DISMISS

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

JAMES B. HOWE,
HUGH A. TAIT,
Attorneys for Defendant in Error.

Seattle, Washington.

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MOTION FOR DISMISSAL.

Comes now the defendant in error and moves the Court that the writ of error in this proceeding be dismissed, upon the grounds that the judgment sought to be reviewed is a joint judgment in favor of defendant in error, Puget Sound Electric Railway, a corporation, and Puget Sound Traction, Light & Power Company, a corporation; that said

Puget Sound Traction, Light & Power Company is not named in the writ of error or citation, or in any way made a party to the proceedings seeking to review said judgment by this court; that no proceeding on the part of plaintiffs in error by way of summons and severance, or its equivalent, was taken or had; and that no notice of said writ of error was given to said Puget Sound Traction, Light & Power Company, nor any opportunity given it to be heard in this court, or upon said writ of error.

This motion is based upon the bill of exceptions and the record in this cause.

JAMES B. HOWE,
HUGH A. TAIT,
Attorneys for Defendant in Error.

To the above named Plaintiffs in Error, and to H. H. A. Hastings, Esq., and L. B. Stedman, Esq., their attorneys:

You, and each of you, will please take notice that the foregoing motion to dismiss the writ of error in this cause will be called for hearing and argument before the United States Circuit Court of Appeals for the Ninth Circuit, at the Court Room of said court, in the City of San Francisco, State of California, at the opening of court, on the 10th day of November, 1914.

JAMES B. HOWE,
HUGH A. TAIT,
Attorneys for Defendant in Error.

ARGUMENT ON MOTION TO DISMISS.

This action was begun by the plaintiffs in error against the defendant in error, Puget Sound Electric Railway, a corporation, and Puget Sound Traction, Light & Power Company, a corporation, jointly, to recover damages for the death of Doctor E. M. Rininger, the husband of Nellie M. and the father of Helen Dorothy Rininger, which was alleged to have been caused by the joint negligence of said defendants.

A trial was had before a jury in the District Court of the United States for the Western District of Washington, Northern Division, Honorable E. E. Cushman presiding.

At the conclusion of the evidence in chief offered in behalf of plaintiffs in error, the defendant Puget Sound Traction, Light & Power Company, which was sued jointly with the defendant in error, moved for a judgment of non-suit, which motion was granted. (Rec. 107.)

The trial of the cause thereafter proceeded as against defendant in error, and at the conclusion of all the evidence, and after both parties to said cause had rested, defendant in error, Puget Sound Electric Railway, moved for an instructed verdict in its favor, which motion was granted. (Rec. 243.)

Thereupon the following verdict was returned (Rec. 253):

"We, the jury in the above entitled cause, find for the defendants, being instructed by the court so to do.

R. T. NOYES,
Foreman."

Thereafter the following judgment was rendered and given upon said verdict (Rec. 254):

"This cause having come on regularly for trial upon the merits on the 11th day of February, 1914, before the court and a jury of twelve persons duly and regularly sworn and impaneled to try the same; Messrs. H. H. A. Hastings and Livingston B. Stedman appearing as attorneys for the plaintiff, and Messrs. James B. Howe and Hugh A. Tait appearing as attorneys for the defendants; and oral and documentary evidence having been offered and received in behalf of both the plaintiffs and the defendants; and the evidence having been closed and both parties having rested their respective sides of said cause; and the defendants, by their said attorneys, having at the close of all the evidence moved the court to instruct the jury to return a verdict against the plaintiffs and in favor of the defendants, upon the grounds that all the evidence failed to show any negligence on the part of the defendants, and affirmatively showed that the plaintiffs' decedent, Edmund M. Rininger, and his servant running and operating the automobile in which

said Edmund M. Rininger, deceased, was riding at the time of the accident complained of, were guilty of such contributory negligence as to bar a recovery; and the court having heard the arguments of respective counsel, and having instructed the jury to return a verdict in favor of the defendants and against the plaintiffs; and the jury, in accordance with such instructions, having thereupon returned such verdict, and having been thereupon discharged from further consideration of the case; and the court being fully advised in the premises; it is now, upon motion of the said attorneys for the said defendants,

ORDERED, ADJUDGED and DECREED that this action be and the same hereby is dismissed; that the defendant Puget Sound Electric Railway do have and recover of and from the plaintiffs its costs of suit herein, taxed at three hundred fifty-nine and 10-100 dollars ($359.10); and that the defendant Puget Sound Traction, Light & Power Company do have and recover of and from said plaintiffs its costs of suit herein, taxed at twenty dollars ($20); and that execution issue therefor.

To all of which the said plaintiffs, by their said attorneys, in open court, duly excepted; which exception is hereby allowed.

Done in open court this 27th day of February, 1914.

EDWARD E. CUSHMAN, Judge."

While it is true that the motion for non-suit in favor of Puget Sound Traction, Light & Power Company, which was sued jointly with defendant in error, Puget Sound Electric Railway, was orally granted by the court on the trial of the cause, the record does not disclose—and we apprehend counsel will not contend—that any formal or written judgment upon said motion was ever signed or rendered. The only judgment which was ever rendered or given in the cause is that which has just been quoted. The verdict was in favor of both defendants. The judgment entered upon the verdict was that the action be dismissed, not as against one defendant only, but as against both.

It cannot, we think, be seriously contended that the verdict is not a joint verdict in favor of both defendants, nor that the judgment rendered thereon is not a joint judgment.

The Puget Sound Traction, Light & Power Company, which was a defendant in the court below, is not named either in the writ of error (Rec. 284) or the citation (Rec. 286); defendant in error, Puget Sound Electric Railway, being alone named in the writ, and the citation, which runs to it only. The defendant Puget Sound Traction, Light & Power Company was never notified of any review sought to be had in this court of the judgment complained of, nor has it ever been given an opportunity to be heard in this court. Although a party defendant in the court below, and having obtained a verdict and judgment in its favor, which it is

manifestly interested in having affirmed, it is not brought before this court, and no opportunity has been afforded it to be heard in the protection of its rights. There is perhaps no rule more firmly established by the Federal courts than that requiring all parties having an interest in a joint judgment to be brought before the appellate court when such judgment is sought to be reviewed.

Masterson vs. Herndon, 10 Wall., 416.
Hardee vs. Wilson, 146 U. S., 179.
Davis vs. Mercantile Trust Co., 152 U. S., 590.
Wilson vs. Kiesel, 164 U. S., 248.
Garcia vs. Vela, 216 U. S., 598.
Illinois T. & S. Bank vs. Kilbourne, 76 Fed., 883.
Dodson vs. Fletcher, 78 Fed., 214.
Ayres vs. Polsdorfer, 105 Fed., 737.
Loveless vs. Ransom, 107 Fed., 626.
Holbrook, etc., Co. vs. Menard, 145 Fed., 498.
Lewis vs. Sittel, 165 Fed., 157.
Ibbs vs. Archer, 185 Fed., 37.
Lamon vs. Speer Hardware Co., 190 Fed., 734.

The cases of *Masterson vs. Herndon* (10 Wall., 416) and *Hardee vs. Wilson* (146 U. S., 179) are those most frequently cited, and appear to be the leading cases upon this point.

In the Masterson case, Mr. Justice Miller said:

"It is the established doctrine of this court that in cases at law where the judgment is

joint, all the parties against whom it is rendered must join in the writ of error, and in chancery cases all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed."

The opinion in the Masterson case is quoted with approval, and the decision followed by Mr. Justice Shiras, in the Hardee case.

In *Ayres vs. Polsdorfer* (105 Fed., 737) it is said:

"The rule is firmly established, at least in the appellate courts of the United States, that where a judgment or decree is rendered against two or more jointly, all must join in suing out the writ of error or prosecuting an appeal, unless those who are not joined have been invited to come in and have refused, and proof that this has been done must be made to appear by the record of the Circuit Court before a writ or error or an appeal by less than the whole can be allowed."

In *Ibbs vs. Archer* (185 Fed., 37) the court says:

"It is well settled in the jurisprudence of the United States courts, at least, that where there is a joint judgment or decree against several defendants, in a writ of error or an appeal from such decree, all the defendants must join, unless it be shown that against those not joining some proceeding in the nature of a summons in severance has been taken or that due notice has been served upon them by the defendant taking the appeal, and that such

defendants have refused to join therein; that this is a part of the substantive law of procedure and is founded upon both reason and authority, is well shown in the opinion of the Supreme Court in *Masterson vs. Herndon,* 10 Wall., 416."

We, therefore, submit that the Puget Sound Traction, Light & Power Company, having been sued jointly with the defendant in error, Puget Sound Electric Railway, and a joint verdict and a joint judgment in favor of these defendants in the court below having been returned and given, and the defendant Puget Sound Traction, Light & Power Company not having been made a party to these proceedings for review, and having been given no opportunity to defend the verdict and judgment in its favor, the writ of error should be dismissed.

ARGUMENT ON THE MERITS.

At the time of this unfortunate accident, the defendant in error, Puget Sound Electric Railway, was operating an electric interurban line between the cities of Seattle and Tacoma in the State of Washington.

A few miles south of Seattle is a small station known as Allentown, and about two thousand feet south of the station mentioned is a small station known as Riverton. About half way between these points is a bridge over which the county road passes, which has been designated in the evidence as the Duwamish Bridge.

The accident occurred at Riverton, July 25th, 1912, at about four o'clock in the afternoon. The day was bright and clear (Rec. 59).

Riverton and the vicinity constitutes a small settlement, the houses being scattered and the land being divided into small acreage. (Rec. 37.) The railway of defendant in error at this point is double tracked, runs practically north and south, and for some distance north and south of Riverton is laid upon its own private right of way. (Rec. 167.)

The county road approaches the tracks from the west at a slight angle, so that one driving from the west toward the track would be traveling in substantially a northeasterly direction. Immediately after crossing the tracks, the county road turns sharply to the left, and in a northerly direction, following the side of the tracks about a thousand feet to the Riverton bridge, where it turns abruptly away from the tracks, and in an easterly direction, across the river. Looking from the crossing at Riverton in a northerly direction, the tracks follow the foot of a bluff on the westerly side thereof and make a gradual curve to the right or east. This bluff begins on the northerly side of the county road and westerly side of the tracks, gradually increasing in height toward the north. About three hundred feet west of the track the county road descends thereto on a slight grade of four per cent. until within thirty feet of the track, and from that point on and until reaching the track the road is level. (Rec. 110.)

At the time of the accident, and for some time prior thereto, defendant in error had erected and maintained an iron post, set a few feet west of its tracks and a few feet north of the county road, upon which was a gong about twelve inches in diameter, operated by electricity, five red electric lamps, and a sign in the form of a cross about six feet long reading "Railroad Crossing." (Rec. 114.)

On the right hand side of the county road, about three hundred feet west of the crossing, defendant in error had placed a sign reading "Caution. 300 feet to Railroad Crossing." On the same pole supporting the sign last referred to, was an automobile sign displaying a symbol to indicate the railroad crossing and the words "Danger, Railroad Crossing," both of which signs were in the position stated on the day of the accident. (Rec. 114.) About twelve hundred feet north of the crossing an electric appliance was placed by the side of the south-bound track, and was so arranged that whenever a south-bound car would pass thereover, it would automatically start the electric gong at the crossing to ring, and cause the red lights on the post to which the sign was attached to burn, until the train passed over the crossing and came in contact with another electric appliance placed about twenty feet south of the crossing, which would cause the gong to cease ringing and the lights to cease to burn. A similar electric contrivance was placed by the side of the north-bound track about twelve hundred feet south of the crossing, and was so arranged that whenever

a north-bound train passed thereover it would likewise automatically start said gong to ringing and lights to burn, which condition would continue until the train had passed over the crossing and reached an electric contrivance placed about twenty feet north thereof.

The iron post to which the electric gong, electric lights and railroad crossing sign were attached was so located that a person driving toward the tracks from the west could see the same for a distance of at least three hundred feet. (Rec. 37.)

Doctor Rininger, for whose death this suit was brought to recover damages, was at the time of the accident riding in his own automobile driven by his own chauffeur. The steering wheel of the automobile was on the right hand side, and Doctor Rininger occupied the forward seat next and to the left of the chauffeur. Two ladies, one of whom was the Doctor's sister, occupied the rear seat. As the automobile approached the crossing from the west, a south-bound limited train, which made no stop thereat, was likewise approaching from the north. The train and automobile collided at the crossing, the forward right hand step of the train coming in contact with the forward right hand hanger or "goose neck" of the automobile, this "goose neck" being the most forward part of the machine and coming out nearly in line with the forward part of the front wheels. That the forward right hand step of the train came in contact with the forward right hand portion of the automobile, is explained

by the fact that the county road approaches the crossing in a slightly diagonal direction, and the automobile was pointed somewhat toward the approaching train. By reason of the impact, Doctor Rininger was thrown out of his automobile and under the train in such a way that his death must have been instantaneous.

At the conclusion of the evidence offered in chief by the plaintiffs in error, a motion for non-suit in behalf of Puget Sound Traction, Light & Power Company (one of the defendants in the court below) was interposed, upon the ground that it failed to appear that such defendant had anything to do with the operation of the trains of the defendant in error, Puget Sound Electric Railway, and was not shown to be in any way responsible for the happening of the accident. This motion was sustained without objection. The cause then proceeded as against the defendant in error, and at the conclusion of all the evidence offered on both sides, and after both sides had rested, a motion in behalf of defendant in error for an instructed verdict was made upon the grounds that there was no proof of negligence on the part of said defendant, and that all the evidence showed that Doctor Rininger and his chauffeur had been guilty of such contributory negligence as would bar a recovery. (Rec. 243.) The motion was sustained upon the latter ground. Since, however, the entire record is before this court for review, we take it that if the judgment can be sustained upon any ground, it will not be

reversed, and that if upon a consideration of all the evidence this court should be of the opinion that negligence on the part of the defendant in error had not been proven, the judgment must stand for that reason, as well as for the reason that all the evidence shows that Doctor Rininger and his chauffeur were guilty of negligence themselves.

The principal, and as we believe only, questions to be determined are, first, whether or not the record shows defendant in error to have been guilty of negligence, and if so, second, whether or not it shows Doctor Rininger and his chauffeur to have been guilty of contributory negligence. We will endeavor to discuss these questions in the order named.

DEFENDANT IN ERROR WAS NOT GUILTY OF NEGLIGENCE.

The allegations of negligence on the part of defendant in error, and the acts of negligence sought to be proven, are that the motorman in charge of the train involved in the collision failed to blow any whistle, that the train was operated at a high and dangerous rate of speed, and that no watchman was kept at the crossing to warn drivers of vehicles of approaching trains. It is not disputed that the tracks of defendant in error for some distance north and south of the crossing were laid upon its own private right of way, over which it undoubtedly had lawful authority to operate its trains at such rate of speed as it saw fit, so long as it did not en-

danger the safety of its passengers. It is also practically conceded that as the train involved in the accident was approaching the crossing at Riverton, and before the motorman saw the automobile in which Doctor Rininger was riding, it was running at a rate of speed of not over thirty to thirty-five miles an hour. This was a through train from Seattle to Tacoma, making no stop at Riverton, and it cannot, we submit, be successfully contended that for such a train a speed of from thirty to thirty-five miles per hour running through a country district is, as a matter of law, dangerous or excessive.

Parkerson vs. Railway Co. (Ky.), 80 S. W., 468.

Baltimore etc. Co. vs. State (Md.), 69 Atl., 439, 446-7.

Freedman vs. Railway Co. (Conn.), 71 Atl., 901, 904.

Burge vs. Railway Co. (Mo.), 140 S. W., 925.

Dyson vs. Railway Co. (Conn.), 17 Atl., 137.

Keiser vs. Railway Co. (Pa.), 61 Atl., 903.

Dubois vs. Railway Co., 34 N. Y. S., 279.

Custer vs. Railway Co. (Pa.), 55 Atl., 1130.

In *Keiser vs. Railway Co.* (61 Atl. 903), which was a crossing accident, the court says:

> "The exact rate of speed shown by the schedule and fixed by the train record made by the conductor at the time, showed the rate of speed to be a little over thirty-five miles an hour. It was a fast passenger train, with two locomo-

> tives, and this rate of speed is not excessive for such a train. It is clear, therefore, that the appellant failed to establish her allegations of negligence that the train was running at an unusual time or at an excessive rate of speed."

In *Dubois vs. Railway Co.* (34 N. Y. S., 279), it appears that plaintiff's intestate was struck and killed by a steam train while attempting to cross the tracks of the railway upon a public highway in the town of Gates, the court saying:

> "This was a rural section of the country, and the fact that the colliding train was running at the rate of fifty-five or sixty miles an hour, was not in itself negligence on the part of the defendant."

In *Custer vs. Railway Co.* (55 Atl., 1130), the court announces the rule:

> "There is no limit to the rate of speed at which a railroad company may run its trains over the open country and over crossings of country roads, so long as the bounds of safety to patrons are not transgressed, *Reading &c R. Co. vs. Ritchie,* 102 Pa., 425; *Newhard vs. Penna. Co.,* 153 Pa., 417."

It is nowhere, so far as we know, held that either electric interurban or steam railway trains must be held under such control that they can be stopped before passing over every country road crossing in time to avoid a collision with a vehicle thereon, where such vehicle suddenly emerges from behind an embankment or other obstruction to the view of

the motorman or engineer, as was shown to be the fact in this case.

The Supreme Court of this state has applied the rule to the operation of street cars in populous cities, and has held that the law imposes no duty upon the motorman of such cars to at all times have the same under such control as will surely prevent accidents at street intersections. If this rule can be applied to the operation of street cars in cities, with what greater force must it be applied to the operation of electric interurban lines running through country districts.

Christensen vs. Union Trunk Line, 6 Wash., 75.

Skinner vs. Tacoma R. P. Co., 46 Wash., 122.

In the Christensen case (p. 79) it is said:

> "And he was not bound to regulate his speed at such a rate as would certainly avoid injury to anyone who might attempt to cross the road in an unreasonable and improper manner. *Meyer vs. Lindell Ry. Co.,* 6 Mo. App., 27."

In the Skinner case (p. 125) the court says:

> "If the motorman sees a clear track and has no occasion to stop and no reason to anticipate danger to another, it would not be negligence to maintain the usual rate of speed even over a crossing."

Counsel for plaintiffs in error devote a considerable part of their brief to the argument that the chauffeur could not see a south-bound train approaching until he got very near to the crossing.

This argument is certainly a two-edged sword, for the reason that it would be impossible for the motorman of the train to have seen the automobile one moment sooner than the chauffeur of the automobile could have seen the approaching train.

The evidence shows that the automobile weighed, exclusive of its passengers, something less than 5000 pounds (Rec. 46), while the single coach, which has been designated in the record as "the train", was 55½ feet long and weighed 43 tons, exclusive of the forty passengers aboard (Rec. 212).

Kent Brodnix, Doctor Rininger's chauffeur, and who was driving his automobile at the time, testified that he was within from twenty-five to thirty feet of the track when he first saw the electric car, at which time he thought the car was not more than 100 to 150 feet away (Rec. 54).

D. M. Dingwall testified that for over eleven years he had been a motorman for defendant in error, running passenger coaches between Seattle and Tacoma, and that in his opinion, judging from his experience as such motorman, a single coach running at thirty-five miles an hour approaching the Riverton crossing, could not be stopped by making an emergency application of the brakes—assuming that the rail and all other conditions were most favorable—within less than from 350 to 400 feet (Rec. 182).

Eugene C. Sanford testified that for the past eight years he had been in the employ of defendant in error as a motorman, operating both freight and

passenger trains; that he was familiar with the tracks north of Riverton; that in his opinion a train approaching Riverton at thirty-five miles an hour could not be stopped within less than 350 to 400 feet, and if running at thirty miles an hour, it could not be stopped within less than 300 to 350 feet (Rec. 184).

F. J. Dunn testified that he had been a motorman for defendant in error for eleven years, running passenger trains; that he was familiar with the Riverton crossing, having passed over it twice a day for the last year, and six times a day for the preceding six years; that a south-bound single coach train approaching this crossing at the rate of thirty-five miles an hour, all conditions being most advantageous for making a good stop, could not be brought to a standstill within less than from 350 to 400 feet, and if such train were running thirty miles an hour, 300 feet would be a good stop (Rec. 185).

R. W. Robson, the motorman of the train involved in the collision, testified that he had been a motorman for defendant in error for three years; that prior to that time he had worked two years for the Spokane Inland Railway, operating electric and steam locomotives; that he had fired for nine years on the Chicago & Alton Railway, a steam road, and had run an engine about seventeen months on the Oregon Short Line; that he did not see the automobile until he got to within from 50 to 80 feet of the crossing, at which time he was running

about thirty to thirty-five miles an hour; that from his experience as a motorman, a good emergency stop for an electric coach running thirty-five miles an hour would be from 350 to 400 feet, and that he actually stopped in about 300 feet (Rec. 210-212).

This testimony stands uncontroverted. Plaintiffs in error offered no proof to show that the train could have been stopped in less distance than it actually was, or that it could have been stopped in time to avoid the collision after the automobile came in sight of the motorman. Therefore, we submit, that so far as the rate of speed at which the train was running is concerned, defendant in error cannot be held guilty of negligence, unless it be held as a matter of law that the motorman must at his peril in every instance stop his train at every road crossing in time to avoid a collision, irrespective of surrounding conditions and irrespective of the rate of speed at which the drivers of vehicles upon county roads approach the track. In other words, we respectfully submit that before defendant in error can be held liable on the ground that it was operating its train at a dangerous rate of speed, the novel doctrine must be indulged in that a railroad company is an insurer against accident to travelers in vehicles at railroad crossings.

The next ground of negligence that plaintiffs in error contend for, is that defendant in error failed to keep a watchman at the crossing. We do not understand that the law imposes upon railways the imperative duty of keeping watchmen or flagmen

at road crossings, or that there is any rule of law which makes it negligence *per se* to fail to keep a watchman or flagman. The only duty imposed, if we correctly understand the rule, is that railroads must use such reasonable care to avoid accidents at crossings, as an ordinarily careful and prudent person would under all the circumstances and conditions exercise. The old rule declaring it to be a question for the jury as to whether or not, under certain circumstances, it was negligence on the part of a railway to fail to maintain a flagman at road crossings, was adopted long before the application of electricity as a motive power for interurban lines, and long before the invention or application of electrically given danger signals. The substance of the rule is only that reasonable care on the part of the railway shall be exercised, and if automatic electrical devices for giving notice to travelers upon highways of the approach of trains have been perfected and installed, it cannot, we submit, be successfully contended that in addition thereto, a flagman must be stationed. As we have already shown, the electric gong, with red electric lights in connection therewith, installed and maintained at the crossing in question by defendant in error, is operated automatically by a train approaching the crossing in either direction, when such train is 1200 feet distant from the crossing. Being a mechanical and automatic contrivance, it is safer and more dependable than a flagman or watchman could be, for the reason that the element of human frailty—inatten-

tion, mistake and carelessness—is eliminated. This electric gong, as the undisputed evidence shows, is twelve inches in diameter, and, as counsel admit in their brief, under ordinary circumstances can be heard ringing for a distance of from 700 to 800 feet from the crossing. Crossed sign boards six feet in length, reading "Railroad Crossing", were placed upon the same post supporting the gong, and 300 feet west of the crossing—that being the direction from which Doctor Rininger was approaching—are two sign boards, one placed by defendant in error reading "Caution. 300 Feet to Railroad Crossing", and the other, an automobile sign, reading "Danger. Railroad Crossing" (Rec. 113-114). As before stated, this electric gong would be "cut in" by a south-bound train when it reached a point approximately 1200 feet north of the crossing, and would continue to ring until such train passed over the "cut out" located about twenty feet south of the crossing. It would also be "cut in" by a north-bound train at a point approximately 1200 feet south of the crossing, and continue to ring until such train passed the "cut out" located about twenty feet north of the crossing. If a south-bound train should stop at any point north of the crossing, the bell would continue to ring until such train passed over the "cut out" on the south side of the crossing, or until a north-bound train should pass over the "cut out" on the north side of the crossing.

Plaintiffs in error attempted to prove that the south-bound limited with which the automobile

came in collision, did not start the electric gong to ringing as it passed over the "cut in" north of the crossing. In making this attempt, they placed upon the stand the following witnesses: Kent Brodnix, Mrs. Roria Springer, Trena Brock, Elora Lamb, and Mrs. Olive R. Lyford, Doctor Rininger's sister. Mr. Brodnix, the chauffeur, upon his direct examination was asked:

> "Q. At that time as you were approaching, or at the time you saw the electric car approaching, was the electrical alarm ringing?
>
> A. Not that I heard." (Rec. 44-45.)

On cross-examination he testified:

> "As to hearing the electric gong ringing at any time before the accident, I could not say absolutely positive, but I don't remember hearing it." (Rec. 56.)

He also admitted that a coroner's inquest was held the day following the accident, at which he testified as follows:

> "Q. There is a gong there, is there not, on the railroad?
>
> A. Yes sir, there is a gong there.
>
> Q. Was the gong ringing?
>
> A. *I did not hear it until I was within about fifteen feet of the track; was the first I heard the gong.*"

Continuing, upon the trial he testified:

> "Q. Did you or did you not testify in substance and effect as I have just read to you?

A. I think I gave that, yes sir.

Q. Now in giving that testimony you were testifying the day after the accident, were you not?

A. Yes sir." (Rec. 56.)

Counsel have suggested that the gong which was heard ringing was one upon the train, and not the electric danger signal gong by the roadside. That the gong Mr. Brodnix had reference to at the time of testifying at the inquest was the electric danger signal gong, is conclusively shown by the following additional testimony he admitted he gave at the inquest:

"Q. Where is the gong located with reference to the crossing?

A. It was on the left hand side going this way (north).

Q. Right at the crossing?

A. It is right by, next to the bluff.

Q. What kind of a gong is it?

A. I did not look at it especially. It is a regular signal gong." (Rec. 58.)

It will be remembered that the accident occurred July 25th, 1912, and that the trial of the cause was not begun until February 11th, 1914, more than a year and a half thereafter. The memory of Mr. Brodnix when he testified before the coroner's inquest the day after the accident, admitting that he heard the electric gong when he got to within fifteen feet of the track, must have been clearer and more reliable than was his memory a year and a

half later, when he testified upon the trial in substance that he did not recollect hearing it.

Mrs. Springer testified that at the time of the accident, she was about fifteen feet west of the platform, meaning the platform leading from the county road to Rosenberg's store. It is shown by actual measurement that the distance from the westerly edge of this platform to the first rail of the south-bound track is ninety feet. (Rec. 109.) She further testified on direct examination:

> "Q. I will ask you to state whether or not that gong was ringing at the time of this accident?
>
> A. I did not hear it. I did hear it ring sometime after; that is when the next car came along." (Rec. 64.)

Trena Brock, a girl thirteen years old, testified on direct examination that at the time of the accident she was with Mrs. Springer, and that "I did not hear the electric gong. I know about the electric gong that is near the crossing and that it rings usually when trains come along, but I did not hear it ring at that time."

On cross-examination she testified:

> "I had lived there before this accident about a year and a half and had become pretty well used to hearing the electric bell ringing, and I got so that I did not pay any attention to it, so that when this train that struck the automobile came along it may have been ringing without my paying any attention to it.

Q. You do not know of your own knowledge that it was ringing or not ringing?

A. I did not hear it and I usually listen for it.

Q. You were not listening to see whether it rang, were you?

A. No sir." (Rec. 74-75.)

Elora Lamb testified on direct examination that at the time of the accident he was standing on the passenger platform on the east side of the tracks waiting for a north-bound train, and that "the electric gong maintained at the crossing did not ring at that time." (Rec. 90.) He also stated that he is a chauffeur himself, knew Mr. Brodnix, and that they were quite friendly. (Rec. 91-92.)

Mr. Lamb was afterward recalled for the purpose of proving that at other times prior to the accident the electric gong failed to ring upon the approach of trains. The only specific instance he was able to give was an occasion about two months before the accident, when he was in the little waiting room on the east side of the tracks, about eleven P. M., waiting for a north-bound train. On cross-examination, he admitted that the door of the little waiting room was open; that the platform upon which the waiting room is constructed is about twelve feet wide, and that the north-bound trains pass right by it; that he missed the train he was waiting for, for the reason that he did not hear it until it got past, and that when the train got as close to where he was standing as the distance from

there was to the electric bell across the tracks, the train would make as much noise as the bell and would drown out the sound of the bell. (Rec. 228.)

If Mr. Lamb was so inattentive that he failed to hear the rumble and noise of the approaching train it was his purpose to take until after it passed the platform, or if his hearing was so poor that it did not apprise him of the approach of the train, certainly but little weight can be given to his statement that the bell did not ring at the time of the accident.

Mrs. Lyford, who was Doctor Rininger's sister, and in the automobile with him, testified upon direct examination that she "heard no signals whatever from the gong ringing." (Rec. 94.) Upon cross-examination she testified:

> "Miss Davis and I kept up the conversation until the train came in view. * * * Perhaps the electric bell might have been ringing without my being conscious of it." (Rec. 96.)

The foregoing negative testimony was met by defendant in error by the affirmative testimony of Mrs. Amelia Nelson, Harry Summerfield, J. C. Rosenberg, Archie Apt, Isaac Gribben, A. L. Brown, F. J. Dunn, G. E. Herpick, Ralph Bressler and R. W. Robson.

Mrs. Nelson testified that she was a passenger on the train involved in the accident, seated in the forward end of the car on the right hand side (being the side on which the electric bell was located) next to an open window; that as the train approached

the crossing, the electric bell rang quite close to the car, and for an instant it startled her and she moved a little way from the window. (Rec. 118.)

Mr. Summerfield testified that he was Superintendent of the Poor Farm of Pierce County; was a passenger on the train involved in the accident; was seated in the rear seat on the right hand side, and that "as our train passed over the roadway, the electric bell at the crossing was ringing; I noticed that very distinctly." (Rec. 135.)

Mr. Rosenberg testified that he was standing about seventy feet west of the track talking to Mrs. Springer (Rec. 141); that "as the automobile was approaching the railroad track the electric alarm was ringing."

> "Q. How far away from the railroad track was the automobile when you first noticed the electric alarm bell?
>
> A. I hardly know how to answer that, Mr. Tait, because I knew at the time of the train approaching that the bell was ringing, and how far the automobile was from the track when I first noticed it, it is hard for me to indicate, but I heard the bell ringing while I was talking to Mrs. Springer; I heard the bell ringing before the auto passed." (Rec. 144-145.)

Mr. Apt testified that he was a passenger on the train; was seated in the second seat from the front on the right hand side next to an open window; that as the train passed over the crossing at Riverton, the electric danger bell was ringing (Rec. 192);

that the train ran about 250 feet after striking the automobile; that he got off the train, went back to the crossing, and when he got there the electric bell was not ringing; that he stayed at the crossing about fifteen minutes, when the south-bound local pulled in, which started the bell to ringing, and it continued to ring until the north-bound limited from Tacoma came, which latter train stopped the bell upon passing over the crossing. (Rec. 194.)

Mr. Gribben testified that he was the conductor of the train involved in the accident; that the electric gong was ringing when his train passed over the crossing; that it ceased to ring after his train passed over the cut out just south of the crossing, but that it started to ring again when the south-bound local pulled up some fifteen minutes afterward, and that the bell again ceased to ring when the north-bound limited from Tacoma passed over the cut out on the north side of the crossing. (Rec. 218-219.)

Mr. Brown testified that he was a passenger on the train involved in the accident; that while he was not positive, he thought the electric gong was ringing as the train passed over the crossing; that he got off the train and went back; was on the ground when the local came in, and as it came in the electric bell was ringing and rang while it was there; that the local stopped 50 or 60 feet north of the crossing and the bell rang until it got off the track. (Rec. 131.)

Mr. Dunn testified that he was motorman of the

local train following behind that which collided with the automobile, and reached Riverton twelve or fifteen minutes after the accident; that when his train got there, the limited was about 200 feet south of the crossing; that his train stopped on the north side of the crossing; that the electric gong was ringing when his train reached Riverton and continued to ring until the north-bound limited passed over the crossing. (Rec. 186.)

Mr. Herpick testified that at the time of the trial he was a moving picture operator, but that at the time of the accident he was in the employ of defendant in error as a collector, and was riding upon the train involved in the accident; that he got off the train and went back to the crossing; that he was at the crossing when the south-bound local pulled in, and the bell was ringing as it came in, and continued to ring until it was cut out by the north-bound limited just a little north of the crossing (Rec. 201); that he is familiar in a general way with the operation of these electric gongs; that when he got off the train and went back to the crossing, the bell was not ringing, having been cut out by the train upon which he was riding, and that it remained silent until it was cut in again by the south-bound local, which started it to ringing. (Rec. 202.)

Mr. Bressler testified that he was conductor of the north-bound limited which arrived twenty or twenty-five minutes after the accident; that his train was flagged and stopped on the south side of

the county road; that he went out to see what the trouble was and was told that there had been an accident; that the gong on the west side of the track was then ringing; that his train remained on the south side of the road for probably half a minute and then crossed over on the north side so as to cut out the electric bell. (Rec. 208.)

Mr. Robson testified that he was motorman on the train involved in the accident; that when his train came to a stop, it had passed the cut out on the south side of the crossing, and when he got back there, the electric gong was not ringing, but began to ring when the south-bound local came in fifteen or twenty minutes later, and that it continued to ring until the north-bound limited afterward cut it out by pulling across to the north side of the county road. (Rec. 212.)

Scott Malone, a witness for plaintiffs in error, testified on cross-examination that he was a deputy sheriff, and reached the scene of the accident within an hour after it occurred; that he stayed there quite a while; that while he was there trains came from the north and probably one from the south, and that as these trains approached the crossing, the electric bell began to ring. (Rec. 71.)

Mr. Brodnix (the chauffeur) testified on re-direct examination:

> "I now state that after the accident I heard the electric danger signal ringing the gong. I stayed down there some little time before I came to the City of Seattle. I do not know

how long after the accident, but there was a train came down from Seattle on the south-bound track to Riverton and stopped there for some time. I would not think it was as long as fifteen or twenty minutes, but I do not know and could not say whether the signal gong was ringing all the time that this second train was there or not, but it did ring part of the time." (Rec. 62-63.)

Isaac N. East (a witness who perhaps showed more bias in favor of plaintiffs in error than any other they placed upon the stand) testified upon cross-examination:

> "The two-coach passenger train came up about twenty minutes later (meaning after the accident) from the north, and as it came up the electric bell started ringing. It started ringing some time after the accident." (Rec. 86.)

When it is recalled that the danger signal gong is operated automatically by the passing of trains over the tracks, that a south-bound local train followed but a few minutes behind the south-bound limited train which again started the gong to ring, and that it continued to ring until a north-bound limited cut out the bell twenty-five or thirty minutes after the accident by passing over the "cut out" on the north side of the county road, and that no evidence was offered to show that any repairs had been made to the bell, or the automatic appliances by which it was operated, between the time of the

accident and the arrival of the south-bound local or the north-bound limited, it seems incredible that the minds of reasonable men could differ upon the fact that the electric gong was caused to begin to ring when the south-bound limited passed over the "cut in" 1200 feet north of the crossing. That the electric gong was in proper working order is not only conclusively shown by the affirmative testimony of disinterested witnesses for defendant in error, but is shown as well by the members of the several train crews whose duty it was to observe the fact. The testimony of the conductor of the north-bound limited, which was flagged at the crossing twenty-five or thirty minutes after the accident, to the effect that when his train reached the crossing it stopped on the south side thereof, that the bell was then ringing as the result of the south-bound local which followed a few minutes behind the train involved in the accident passing over the "cut in," and that in order to stop the ringing of the bell he moved his train across the "cut out" on the north side of the road, is so convincing that all doubt is removed. In addition to this, at least three witnesses for plaintiffs in error admitted that the approach of the south-bound local train set the ball into operation. It cannot be argued that there was any defect in the appliance upon the south-bound limited, for the reason that it cut out the bell upon passing over the crossing. Neither can it be argued that there was any defect in the "cut in" appliance north of the track, for the reason that it was set in

operation by the passage thereover of the southbound local.

The remaining ground of negligence contended for by plaintiffs in error is that the approaching train blew no warning whistle as it neared the crossing. We will not go into this feature of the case as fully as we did that respecting the ringing of the electric bell, but will content ourselves with a brief reference to the testimony.

In behalf of plaintiffs in error:

> Mr. Brodnix testified: "I did not hear any whistle or the ringing of any bell on the car." (Rec. 44.)
>
> Mrs. Springer testified: "I was talking with Mr. Rosenberg and I was facing the store and my side was toward the crossing and I was engaged in conversation with him at the time the collision occurred. I was not paying any attention to either the electric bell or the whistle of the train.
>
> Q. You do not wish to have the jury understand that you are swearing unqualifiedly, do you, that no whistles were blown?
>
> A. Well, I said I did not hear them.
>
> Q. You did not hear it, that is all you know about it?
>
> A. Yes sir." (Rec. 66.)
>
> Trena Brock testified: "I heard no whistles from the train that was coming south." (Rec. 74.)

And on cross-examination said:

"Q. Now all you know about it is that if the whistles on that train blew, you do not recollect hearing them?

A. No sir; it may have blown without my hearing it." (Rec. 75.)

Mr. East testified: "I did not hear any whistles from the approaching car. I was right there on the road." (Rec. 79.)

Mr. Lamb testified: "I did not hear any whistles blown on the train and I was watching it all the time. I am sure I could have heard the whistles if any had been blown on this train." (Rec. 90.)

It will be recalled that Mr. Lamb is the young gentleman who admitted that while waiting to take passage on a north-bound train at the same station he did not hear it until it had passed him.

Mrs. Lyford testified: "I heard no whistles from the approaching train." (Rec. 94.)

And on cross-examination said: "It is possible that the train may have blown a whistle a quarter of a mile or a half a mile up the track and I did not hear it." (Rec. 96.)

The following affirmative testimony was given in behalf of defendant in error:

Mr. Overlock, a passenger on the train, testified: "I recall that the crossing whistle was blown before the train reached the Riverton crossing; it was blown just after we left Allentown. Allentown is, I should think, about 1000 or 1200 feet from Riverton. The whistle signal

that was blown was two long and two short blasts, regular crossing whistle." (Rec. 120-121.)

Mr. Brown, a passenger, testified: "The crossing signal was blown before we reached Riverton.

Q. At about what point?

A. After passing the rock quarry.

Q. And that would be how far north of the Riverton crossing?

A. I never measured it, but it is only a few minutes' ride, just a short distance, should say a quarter of a mile." (Rec. 131.)

Mr. Summerfield, a passenger, testified: "I heard the road crossing signal just a minute or so before the accident happened and then immediately prior to the accident. The first signal was four blasts. I would not want to state the exact distance north of the crossing I heard it. We were north of the Riverton crossing when I heard it a very short time, a minute or so before we reached Riverton." (Rec. 135.)

Mr. Rosenberg, who was standing by the side of the county road a little over ninety feet west of the track, testified: "I heard an approaching train and heard the whistle and the rumbling of the train. The last whistle that I heard was four blasts, the regular crossing whistles that railroads always give, two long, a short, and a long one." (Rec. 143.)

Mr. Apt, a passenger, testified: "As we approached Riverton there were two long and two short blasts blown about where the county bridge crosses the river at Riverton. I should judge this bridge is 300 yards north of the crossing." (Rec. 192.)

Mr. Herpick, who was riding upon the train, testified: "As the train was approaching Riverton, there were two long and two short blasts of the whistle blown just after we left Allentown, which is the regular road crossing signal. I heard other whistles afterward just a second before we hit the crossing. There were three or four short blasts of the whistle." (Rec. 200.)

Mr. Robson, motorman of the train involved in the accident, testified: "As I was approaching the Riverton crossing, I whistled the crossing whistle shortly after leaving Allentown. This whistle consisted of two long and two short blasts, and was perhaps 800 or 900 feet from and approaching the Riverton crossing." (Rec. 210.)

Mr. Gribben, who was conductor in charge of the train involved in the accident, testified: "I remember that there was the regular road signal given by the motorman before reaching the Riverton crossing, consisting of two long and two short whistles, and I think the train was a little past Allentown, which is in the neighborhood of 3000 feet north of there." (Rec. 218.)

It will, therefore, be seen that the allegation that the electric danger signal gong did not operate as the south-bound limited approached the crossing, and that no warning whistles were blown by the train mentioned, is supported only by the negative evidence of witnesses who testified merely that they "did not hear it," while the fact that the electric gong did ring, and the regular road crossing whistles were given, is conclusively shown by the affirmative testimony of witnesses who heard these signals, many of whom gave convincing reasons as to why the fact that the signals were given was impressed upon their memory. Counsel contend that what they designate as "conflicting evidence" upon these points, necessitated the submission of the question to the jury. So far at least as the allegation of negligence on the part of defendant in error is concerned, we readily concede that in many cases where a fact is affirmed on one side and denied on the other, it must be left to the jury to determine what the truth is; but the rule is well established in cases of this character that where the contention is made that a whistle was not blown or a bell was not rung, and such contention is supported only by the negative testimony of witnesses to the effect that they "did not hear" such whistle or bell, and the fact that such whistle or bell was blown or rung is shown by the affirmative testimony of witnesses to the effect that they heard it, and especially where it is the duty of one or more such witnesses to listen for such signals and ascertain the fact, the negative

testimony must give way to the positive, and no question is presented for the determination of the jury.

Long vs. McCabe, et al., 52 Wash. 422-430.
Holland vs. Northern Pacific R. Co., 55 Wash. 266-269.
Lee vs. Railway Co. (Minn.), 70 N. W. 857.
Knox vs. Railway Co. (Pa.),, 52 Atl. 90.
Clark vs. Railway Co., 40 N. Y. S., 730.
Keiser vs. Railway Co. (Pa.), 61 Atl. 903.
Culhane vs. Railway Co., 60 N. Y., 133-137.
Horn vs. Railway Co. (C. C. A. 6th Ct.), 54 Fed. 301, 305.

In the case of *Long vs. McCabe, et al.,* (52 Wash. 422) commencing at the bottom of page 430, the Court says:

> "In other words, as against a motion for a judgment at the close of plaintiff's case and renewed at the close of all the evidence, a *prima facie* showing is to be determined as a matter of law by the Court in the light of the explanations made by the defendant. The duty of measuring the evidence not as to its weight but its legal effect, is put upon the Court. What may have been evidence *prima facie* may not be so when rebutted by other evidence. The negative testimony must give way to the positive evidence."

In *Holland vs. Northern Pacific R. Co.* (55 Wash. 266), commencing at the bottom of page 269, the following language is used:

"The statements of a person who testifies that he did not hear a bell ring or a whistle blow, where he is a mere passer by without object or purpose in ascertaining the fact, is never sattisfactory evidence even under favorable circumstances, and it is entirely too much to say that the statement of this witness that he did not hear the whistle under the circumstances shown, is proof of the fact that it was not blown."

In *Keiser vs. Railway Co.* (61 Atl. 903) the Court says:

"The appellant undertook to show that the whistle was not blown nor the bell rung. Nine witnesses testified that they did not hear the bell ring nor the whistle blow. The testimony of all these witnesses was negative in character, and cannot prevail against the positive and conclusive testimony of the appellee, which clearly showed these duties to have been performed. This case comes under the rule stated by Mr. Justice Paxson in *Urias v. Pennsylvania Railroad Company,* 152 Pa. 326, 25 Atl. 566, wherein it is said: 'One witness who hears the ringing of a bell is worth more than the testimony of a dozen witnesses who did not hear it, unless in some manner their attention had been especially called to it. The witness who heard the bell either tells the truth, or he tells a deliberate and willful falsehood, while the witness who did not hear the bell may be, and

probably is, truthful. The bell may be rung or the whistle blown without attracting the attention of the persons who are familiar with such sounds.' "

In *Culhane vs. Railway Co.* (60 N. Y. 133), at page 137, the Court thus announces the rule:

"It is proved by the positive oath of the two individuals on the engine, one of whom rang it, and by two others who witnessed the occurrence and heard the ringing of the bell. The two witnesses for the plaintiff merely say they did not hear the bell, but they do not say that they listened or gave heed to the presence or absence of that signal. The judge in his charge says they listened, but the statement is not borne out by the evidence. As against positive, affirmative evidence by credible witnesses to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching and listening for it, that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. A mere 'I did not hear' is entitled to no weight in the presence of the affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact."

In the case of *Horn vs. Railway Co.* [(C. C. A. 6th Ct.), 54 Fed. 301], at page 305, the Court says:

> "In the very nature of things their affirmative testimony that the warning was given (referring to the blowing of a whistle as a train approached a crossing) must be accepted as proof of that fact, notwithstanding an equal or greater number of witnesses failed to notice it from whatever cause. There is in such cases no conflict of evidence as to the matter in question. The observation of the fact by some is entirely consistent with the failure of others to observe it, or their forgetfulness of its occurrence. *Stitt vs. Huidekopers,* 17 Wall. 393."

DOCTOR RININGER AND HIS CHAUFFEUR WERE GUILTY OF CONTRIBUTORY NEGLIGENCE.

Judge Cushman directed a verdict in favor of the defendant below upon the ground that all of the evidence showed that Doctor Rininger and his chauffeur approached the railroad crossing in such a careless and negligent manner and with so little regard for their own safety, that, as a matter of law, plaintiffs in error could not recover.

It will be remembered that Doctor Rininger was driving toward the tracks from the west and going in a somewhat northeasterly direction, and that beginning a short distance from the north side of the road and on and very close to the west side of the

tracks, a bluff began to rise, which increased in height as it extended northward; that north of the crossing the tracks followed the foot of the bluff curving somewhat to the east; that about 2,000 feet north of the crossing is a small station known as Allentown; that owing to the curve of the bluff and of the tracks at its base, there is a point on the county road to the west of the tracks where one could see a south-bound train at Allentown, but which, owing to the curve of the bluff and tracks, would for a short distance pass out of sight behind the bluff and would again come into view before reaching the crossing at Riverton. Just how far west of the tracks this point is, the evidence does not definitely show, but it does appear that it is some distance further back from the tracks than the automobile was at the time Mr. Brodnix, the chauffeur, looked to the north and saw the train approaching.

According to Mr. Brodnix's own version of how the accident occurred, he was within twenty-five or thirty feet of the track when he first saw the train, at which time he admits that he was running at the rate of twelve miles an hour. He says that he immediately applied his brakes with such force as to lock the two rear wheels, and that the automobile skidded to a point so near the track that the extreme front end of the automobile was struck by the overhang of the car.

Since this Court cannot determine the question of contributory negligence without being in posses-

sion of all of the facts, we are compelled to refer to the evidence somewhat in detail.

Mr. Brodnix testified that for seven years he had been an automobile driver and repair man; that at the time of the accident and for three months prior thereto, he had been in Doctor Rininger's employ as a chauffeur; that to a certain extent he was familiar with the Riverton crossing (Rec. 43); that when he got to the top of the grade, about 300 feet from the crossing, he released the engine from the machine and coasted down the grade, using the brake to control the machine; that at the time he was going fifteen or sixteen miles an hour; that when he got to the store (meaning Rosenberg's) he looked in both directions and saw no train; that he "let the machine come on down," again looked south and then looked north, at which time the train was only a short distance from the crossing; that before this, he had "made an effort to listen" for approaching cars; that Doctor Rininger looked both ways and gave him a signal to go ahead (Rec. 44); that he was within from twenty-five to thirty feet of the track when he first saw the train and immediately set the brakes, causing both rear wheels to skid; that when he first saw the train it was from one hundred to one hundred and fifty feet away (Rec. 45); that "as we approached the crossing we were going at a speed I should judge of about fifteen miles an hour, not to exceed that. Ordinarily I could bring this automobile to a standstill when

proceeding at that rate under similar conditions in about twenty-five feet." (Rec. 47.)

"Q. Is there any point on or near the crossing where you could see an approaching southbound car all the time after it leaves the Allentown station?

A. Yes.

Q. Whereabouts is that?

A. I should judge 25 or 35 feet from the track." (Rec. 48.)

That when he disengaged his clutch, Doctor Rininger was seated beside him and to his left in the front seat, was turned somewhat sideways, with his face towards the south talking to the ladies in the back seat; that he (Doctor Rininger) afterward turned around and looked to the north, after which Brodnix thought he turned back toward the ladies; that when Doctor Rininger looked toward the north, the automobile was 50 or 60 feet from the track (Rec. 49-50); that he had been driving automobiles in King County six or seven months before the accident, and had passed over the crossing six or seven times during that period (Rec. 51); and that he knew the tracks were there and that the bluff was there (Rec. 52).

He further testified:

"I should judge I was about 25 feet—from 25 to 30 feet—from the track when I first saw the train. I had looked to the south just prior to that time and had looked to the north

possibly 30 feet farther back, so that I should judge that the last time I looked toward the north I must have been about 55 feet from the track and saw no train. When I first saw the train I could not say exactly how far it was from the crossing, but I should judge about 100 feet, but I could not say positively, and when I first saw the train I saw it across the point of that bluff on the left hand side of the county road, and I was looking directly north or up the track in a northerly direction at the moment the train came into view from around the bluff. I saw the train just as soon as it emerged from behind the point of the bluff. At that time we were running our automobile at about 12 miles an hour.

Q. Well, I understood you to say this morning that you were running at fifteen or sixteen miles an hour.

A. Well, right at that time I was not running as fast as I had coming down the hill. (Continuing.) I was running from 15 to 16 miles an hour as far back, possibly, as 100 feet from the track, but when I saw the train coming, I should judge that I was not running to exceed 12 miles an hour, and we were then within 25 feet of the track.

Q. And at 12 miles an hour, within what distance do you think you could have stopped your machine?

A. Well, I don't know—I know I stopped it, that is all I know.

Q. It took you 25 feet to stop it, didn't it?

A. I should judge it was close to 25 feet. (Continuing.) I first saw the train when I was within 25 feet of the track and then applied the brakes so hard that it skidded the rear wheels and the machine moved forward until the front end of the automobile was so close to the rails that the overhang of the electric car struck it. The front wheels did not cross the rails of the track, but stopped just before we got to the rail. We stopped about close enough so that the body of the car hit us. I think that our wheels skidded the entire 25 feet on the ground, or that distance, whether it was 25 feet or not I cannot say. The rear wheels skidded from the time that I set the brakes. It was the goose-neck of the automobile that was hit. That is the part of the frame that holds the front spring." (Rec. 52 to 54.)

That this goose-neck is the most forward portion of the automobile and goes out nearly even with the front edge of the wheels; that it was the forward right hand corner of the electric car which struck the automobile; that throwing out the clutch on the automobile disconnects the engine from the rear axle, but does not stop the engine, which continues to run, and makes about as much noise as it does while the clutch is connected, so that so far as the noise of the engine is concerned, it made no

difference whatever whether he threw out the clutch or left the engine connected; that he could not describe the amount of noise the engine made, but it made quite a little bit (Rec. 54-55); and that if he had stopped the engine, it is possible he could have heard a little better.

Mr. Brodnix admitted that when testifying at the coroner's inquest the day after the accident, he made the following answer to the following question:

> "Q. How fast were you driving as you approached that track?
>
> A. I don't think I was traveling over 15 miles an hour." (Rec. 56.)

He also testified:

> "The customary signal that Dr. Rininger gave me to go ahead was a nod of the head. I could not say exactly how far we were from the track when he gave this signal, but according to my best recollection I was possibly 5 or 10 feet back from where I first saw the car. I should judge something like 30 or 35 feet from the track.
>
> Q. Now do you wish to say, Mr. Brodnix, that from 30 to 35 feet back from the track there would be any point between the crossing and Allentown where an ordinary passenger train would be obscured from view by reason of this bluff?
>
> A. Well now, as to that I could not say." (Rec. 59.)

He further testified that he had lived in Seattle and King County for six or seven months before the accident and knew that trains passed over the interurban track at very frequent intervals (Rec. 60); that *as we were going toward this road crossing there was no point at which we stopped before reaching the track for the purpose of looking and listening to see if there was any train coming, and there was no time at which we were running less than twelve miles an hour until the train was within 25 feet of us and I applied the brakes.*" (Rec. 61.)

Elora Lamb, a witness for plaintiffs in error, testified: That he was a chauffeur; that at the time of the accident he was standing on the passenger platform at Riverton waiting for a north-bound train; that he saw Doctor Rininger's automobile as it was approaching the crossing; that the automobile was approaching the crossing at a speed of between 12 and 15 miles an hour (Rec. 89); that he had been driving automobiles about six years; that an automobile such as Doctor Rininger's running at a speed of 15 miles an hour, could not, in his opinion, under emergency be stopped within less than from 20 to 25 feet; that if it had been running at 12 miles an hour, it could have been stopped within 15 feet. (Rec. 92.)

The following testimony was given by witnesses for defendant in error:

Mr. Overlock testified that he drove his own machine, and that:

"I am familiar with what is known as a

four-seated Stearns machine. From my experience in handling my own machine and knowledge of other automobiles, and my familiarity with this crossing, I think on a dry day when the road was dry and dusty and as the road actually existed there in the latter part of July, 1912, a four-seated automobile carrying four passengers, weighing between 4,500 and 5,000 pounds, driving toward the track from the westerly side at 12 miles on hour, such a machine could be stopped within 10 or 12 feet."

Q. Taking the same conditions, the same machine, as I have put in my other questions, if in stopping that machine it stopped at a point with the front wheels very near the first rail of the track, but not quite to the rail, and marks on the ground show that the rear wheels had skidded from 35 to 40 feet, that the rear wheels had locked and skidded along the road for 35 or 40 feet, at what rate of speed, in your judgment, was the automobile traveling when the brakes were applied?

A. I should say at least 30 miles an hour." (Rec. 122-123.)

He further testified that he went back after the accident, saw the marks on the ground where the Rininger automobile had skidded, and judged them to be 30 feet in length; that in his opinion, if the automobile skidded 30 feet with the wheels locked,

it could not have been going less than 25 miles an hour. (Rec. 127.)

Mr. Hill testified: That he saw the skid marks on the road; that they were 25 or 30 feet in length and came down to within 8 or 10 feet of the track, or about the length of the machine, and that the road was dry. (Rec. 129.)

Mr. Rosenburg testified: That when the automobile was within 75 feet of the track, it was running between 15 and 20 miles an hour (Rec. 142); that on the afternoon of the day of the accident, the surface of the road was dry and dusty; that

> "I noticed after the accident marks on the road to show that the automobile had skidded. I saw the skid marks from the tires of the machine which had raked off the greyish surface of the road and had the appearance as if it burned the surface of the road by taking off the grey surface and leaving the brown skid marks on the road (Rec. 146); I was requested to make a mark on the road and to drive a spike showing where the skidding began, and I took a line mark from the store window to a cross fence on the interurban right of way, a fence that goes across the right of way from the south end of the platform to the extreme west boundary of the right of way, and I fixed my line of vision on that fence, and had a perpendicular line on the road about where the skid started, which I had obtained by sighting across the road from a point on the one side

> to a point on the other, which I have just described, and I have measured the distance from this line as fixed by me down to the tracks, which is 39½ feet. (Rec. 147.")

That at a point in the center of the county road, 60 feet west of the track, a train could be seen coming the entire distance from Allentown to the Riverton crossing. (Rec. 154.)

Mr. Sharp testified: That at the time of the accident he was on the east side of the track at Riverton, and saw the automobile before it was struck; that when he first noticed the automobile it was about 40 feet from the track, moving at a speed of from 25 to 30 miles an hour; that the wheels were then locked and skidding, and that the automobile skidded about 40 feet until it came to a stop. (Rec. 168-169.)

Mrs. Rosenberg testified: That she was in the store looking out of the window when the automobile passed, and that while she could not estimate the rate of speed in miles per hour, it seemed to her "it was going fast"; that she afterward pointed out where the automobile was when she first saw it and a measurement showed it to have been 97 or 98 feet from the track, and that as the automobile passed her range of vision through the door, it did not seem to slacken speed any. (Rec. 172-173.)

Mr. Apt, who was a passenger on the train, seated on the right hand side and next to the direction from which the automobile was approaching, testified:

"When we were within 150 to 200 feet of the crossing, I was looking out of the window and saw the automobile which was struck. When I first saw the automobile the train was about 50 feet from the crossing. The automobile was about 50 feet from the crossing when I first saw it. It was moving toward the crossing. The train and the automobile were just about the same distance from the crossing, when I saw it, as I had been looking down toward the crossing some time before I saw it, and there was nothing that obstructed my view of it until I came right around the bluff, and I saw the left rear wheel skidding, as that was the side toward me, so that it was skidding when it was 50 feet from the track.

I am able to have a reasonably correct estimate of the rate of speed at which the train was moving when I saw the automobile, and I should think it was moving from 30 to 35 miles per hour. The speed of the automobile when I first saw it seemed to be just about the same as the speed of the train. I saw Dr. Rininger standing up in his machine, as the top of it was down, and I should say the auto was within 20 or 25 feet of the track when the doctor rose to his feet. After I saw the auto, I do not think the wheels revolved at all.

When I got back to the crossing, I saw fresh marks on the roadway which showed that the wheels had skidded, and I estimated that the

length of the skid marks on the ground was about 40 feet. These skid marks stopped about 13 feet before they got to the rail." (Rec. 192 to 194.)

Mr. Herpick testified: That he was riding on the train involved in the accident; that he was seated in the forward end of the car on the right hand side, next to an open window, looking out most of the time; that he saw the automobile before the collision and when it was about 50 or 55 feet from the crossing; that the front end of the train was about the same distance therefrom (Rec. 200); that when he first saw the automobile, it was running from 18 to 20 miles an hour, and the train was moving about 30 or 35 miles an hour; that there was nothing to cut off his view of the automobile while he was leaning out of the window looking in that direction; that when he went back to the crossing, he saw fresh skid marks on the road, and although he paid no attention to the length of them, he was positive they were 20 feet long. (Rec. 201-202.)

Mr. Bressler, conductor of the north-bound limited which reached the crossing something less than half an hour after the accident, testified: That his attention was called to the skid marks on the county road west of the tracks; that he could see them distinctly, and that in his opinion, the distance from the easterly end of the skid marks to the westerly rail of the south-bound track was 10 to 12 feet, and

that the skid marks themselves extended about 30 feet. (Rec. 241-242.)

Mr. Robson, who was motorman of the train involved in the accident, testified: That he did not see the automobile until he got within 50 or 80 feet of the crossing, at which time the automobile was about 50 feet from the track. (Rec. 210.)

Mr. Will H. Morris, a witness for plaintiffs in error—a lawyer of long standing in Seattle and a friend of Doctor Rininger—testified: That he reached the scene of the accident shortly after it occurred; saw the skid marks on the county road west of the crossing; that he stepped their length and estimated them at 21 or 21½ feet; that the road was dry and pretty solid, although there was not so much dust at this particular place; and that the easterly end of the skid marks came to within an automobile's length of the westerly rail. (Rec. 229-232.)

Whatever discrepancies there may be in the mere opinion of witnesses as to how far west of the track a train could be seen approaching all the way from Allentown, the fact, we submit, is conclusively fixed by the photographs taken by Mr. Aldrich, a professional commercial photographer. For the purpose of having these views taken, a special train was sent to Riverton, and the various distances the train was stopped north of the crossing were ascertained by actual measurement before the train was moved. These photographs were received in evidence without objection, marked respectively Exhibits "B,"

"C," "D," "E," "F," "G," and "H" and have been forwarded to the clerk of this court.

In taking the photographs marked "C," "D," "E," "F" and "G," the camera was located in the center of the county road 64 feet west of the west rail of the south-bound track, looking in the direction from which the car which collided with the automobile approached the crossing. Exhibit "C" shows a railroad coach 1,170 feet north of the crossing. Exhibit "D" shows a coach 890 feet north of the crossing. Exhibit "E" shows a coach 783 feet north of the crossing. Exhibit "F" shows a coach 360 feet north of the crossing, that being the point in the curve of the track where a train would pass most nearly out of view of a person standing on the county road 64 feet west of the track. Exhibit "G" shows a coach 240 feet north of the crossing. In taking the photograph marked Exhibit "H," the coach was stopped 550 feet north of the crossing and the camera was standing upon the motorman's vestibule looking south toward the crossing. This picture shows an automobile standing on the county road 64 feet west of the track. The automobile is indicated by a small cross placed directly above it on the picture. Of course, if the automobile could have been seen from the forward platform of the train while the train was 550 feet from the crossing and the automobile 64 feet west thereof, it follows that Mr. Brodnix could have seen the train 550 feet away when he was 64 feet from the crossing.

Even though the motorman could have seen the

automobile when it and the train were at the points just referred to, it was not the duty of the motorman to stop his train, for he would have had a legal right to presume that the driver of the automobile would stop until the train had passed.

Christensen vs. Union Trunk Line, 6 Wash. 75, 79.

Helber vs. Spokane St. Ry. Co., 22 Wash. 319, 322.

Woolf vs. Washington R. N. Co., 37 Wash. 491, 504.

Duteau vs. Seattle Electric Co., 45 Wash. 418.

Mey vs. Seattle Electric Co., 47 Wash. 497.

Pantages vs. Seattle Electric Co., 55 Wash. 453.

In the case last cited, the following instruction was requested and refused:

> "You are instructed that if you find that the motorman saw the automobile upon the track and there was nothing to obstruct the view of the occupants of the automobile of the approaching car, such motorman had a right to assume that the automobile would be turned off the track and out of danger in time to avoid a collision, and the motorman had a right to indulge in such assumption until the danger of a collision became imminent,"

the Court saying: "This requested instruction clearly states the law of the case and should have been given."

It appears then by the admission of Mr. Brodnix himself that he had passed over this crossing six or seven times within the preceding six months and was somewhat familiar with it; that he knew the railroad tracks and the bluff were there, and that trains passed over the tracks at frequent intervals; that he first saw the train approaching across the point of the bluff, at which time he was within 25 or 30 feet of the track, and was then running at the rate of 12 miles an hour; that he at no time was running less than 12 miles an hour as he approached the track; that he at no time stopped to look and listen; that when he disengaged his clutch from the engine 300 feet west of the track, his engine continued to run and made as much noise as it would have made if he had not disengaged it; that the noise of his engine to some extent interfered with his ability to hear an approaching train; that when he got to a point where he could first see the train, he applied his brakes with such force as to lock both rear wheels of the automobile, which skidded up to a point so close to the rails of the track before it came to a stop that it was struck by the overhang of the train, and that running at 12 miles an hour, it took him 25 feet to stop.

The exhibits we have referred to show beyond contradiction that at a point 64 feet west of the track Mr. Brodnix could have seen the approaching train all the way from Allentown, 2,000 feet away. There was nothing to obscure his view from that point on, and the nearer he got to the track the

better would he have been able to see the train. There can be no doubt about the fact that when he got to within 30 feet of the track—the greatest distance he says he was away when he first saw the train—he could have seen it clearly and distinctly for at least 2,000 feet. Taking his own version, and reading the evidence most strongly in favor of the plaintiffs in error, Mr. Brodnix as he approached the track, knowing the bluff was there, was running his automobile at such a speed that he was unable to stop the same in order to avoid a collision after he got to a point where he could see whether or not a train was approaching. If one drives an automobile towards a railroad track, knowing that trains pass thereover at frequent intervals, at such a rate of speed that he cannot stop in order to prevent accident, after he gets to a point where he can see whether or not a train is coming, and nevertheless will be permitted to recover, the law of contributory negligence, we submit, must be erased from the books.

In discussing this question upon the theory that the automobile was only running 12 miles an hour, we have taken the most favorable view possible for plaintiffs in error.

Mr. Lamb, one of plaintiffs' own witnesses, testified that in his opinion the automobile was running at from 12 to 15 miles an hour as it approached the track, and if it had been running at 12 miles an hour, could have been stopped in 15 feet.

Mr. Overlock, who drives his own automobile and

was thoroughly familiar with the condition of the crossing at the time of the accident, testified that in his opinion it could have been stopped within from 10 to 15 feet if running at no greater rate than 12 miles an hour. That it was running at a much higher rate of speed is shown by the testimony of Mrs. Rosenberg, who says that when it passed the front of her store it was going fast; and by that of Mr. Rosenberg, who was standing by the roadside, and says that when the automobile passed him, it was going from 15 to 20 miles an hour. The most convincing proof that the automobile could not have been running less than 25 miles an hour when Mr. Brodnix applied his brakes, is the length of the skid marks upon the road, which were certainly not less than 25 or 30 feet in length.

While it appears that commencing about 300 feet from the track, the county road descended toward the same on a four per cent. grade, the testimony of Mr. Woodworth, who made actual measurements upon the ground, shows that for a distance of 30 feet west of the track, the road was level. The road was of macadam, had been newly repaired, and was dry and firm. Certainly no better braking or resisting surface could well be imagined.

For the purpose of showing what rate of speed the length of these skid marks indicated, defendant in error placed upon the stand three expert automobile men, the first of whom, Mr. De Jarlius, testified that he owns three automobiles kept for hire and understands their practical operation; that he

was familiar with the Riverton crossing in the latter part of July, 1912, having passed over it every summer an average of once a week; that a Stearns automobile, weighing 4,500 pounds, approaching the crossing from the west, on a dry day, running at 12 miles an hour, could be stopped within a distance of 12 feet; that if such an automobile approaching the tracks from the west should skid from a point 39 feet west of the west rail, coming to a stop with the front wheels practically at the rail, it would indicate in his judgment that when the brakes were applied, the automobile was going at not less than 30 or 35 miles an hour. (Rec. 177.)

Mr. Taylor testified: That he is an automobile engineer and understands their practical operation; that for four years he was superintendent of the Winton Motor Carriage Company, having entire control of all the cars both in the building and outside, which necessitated a great deal of driving and the operation of heavy automobiles; that previous to that time he was a tester for the Olds Motor Works, and also tester for the Ford Company; that he was familiar with the Riverton crossing; that if a sixty horse power automobile weighing 4,500 pounds and carrying four passengers, should approach the Riverton crossing from the west, on a dry warm afternoon, and the brake was applied with such force as to lock the two rear wheels, so that the machine thereafter skidded a distance of 39 feet and came to a stop with the front wheels almost but not quite upon the west rail of the

track, in his opinion such automobile at the time the wheels were locked could not have been traveling less than 30 miles an hour; that if under the same conditions such automobile skidded 25 feet, in his opinion its rate of speed at the time the wheels were locked would have been a little better than 20 miles an hour; that if such a machine under the same conditions, was approaching the crossing in question at a speed of 12 miles an hour, it could have been stopped within a distance of 12 feet; that if such an automobile at the same place and going in the same direction, were running at the rate of 15 miles an hour, and the wheels were locked, it would probably skid 16 feet; that he had tested the matter out several times and knew he could stop a loaded automobile running at 12 miles an hour in 12 feet on a down grade up to 5 or 6 per cent. (Rec. 179 to 182.)

Mr. Stabler testified: That he had been a chauffeur for nine years and had driven nearly all of the principal makes of automobiles, such as Packards, Pierce-Arrows and Stearns; that he was familiar with the crossing at Riverton, having passed over it many times, and as often as four or five times a week during the summer of 1913; that in his opinion if a Stearns automobile carrying four persons should skid 30 feet in approaching the track from the west, coming to a stop with the front wheels very near the first rail of the track, such automobile would have been running in the neighborhood of 30 miles an hour when the wheels began to skid,

and that such an automobile carrying the same passengers and approaching the track from the same direction, running at 12 miles an hour, could be stopped within the length of the automobile, or within about 12 feet. (Rec. 205-206.)

No attempt was made to meet this evidence, except that plaintiffs in error placed upon the stand a Mr. Krandall, who testified that he was an automobile mechanic, but was not familiar with the Riverton crossing, and that going at a speed of from 15 to 20 miles an hour, at one time he would skid probably 10 feet in making a stop, and the next time pretty nearly 20 feet. (Rec. 236.)

If it be true that such uncertainty does exist as to the distance within which an automobile can be stopped, it seems to us that all the more care should be exercised by one approaching so dangerous a place as a railroad crossing. It is true that some of the cases hold that there are conditions under which it is not the imperative duty of a traveler upon a highway to stop, in addition to looking and listening, before attempting to cross railway tracks, but these cases, we think, it will be found are where the facts show that stopping could neither aid the sense of sight nor that of hearing. If one should attempt to drive across a railroad track in a perfectly open country where there were no obstructions to the view or hearing of the driver, it could very logically be held that the failure to stop was not negligence, since such act would not aid the sense of sight or hearing. It has, however, so far

as we have been able to discover, never been held that where there are obstructions such as embankments, buildings or shrubbery, which cut off the view or deaden the sound, it is unnecessary to stop, if such precaution is required in order to aid the sense of sight or hearing.

That a railroad track is in itself a warning of danger; that a traveler upon a highway approaching such track must look and listen, and stop if necessary, at a point where looking and listening will avail him in determining whether or not a train is approaching; that to look and listen at a point where the view is obstructed or sound would be deadened, is unavailing, and that one must in addition stop before attempting to cross the tracks, if by so doing stopping will aid his senses, we invite the Court's attention to the following cases:

Railroad Co. vs. Houston, 95 U. S., 697.

Schofield vs. Railway Co., 114 U. S., 615.

Northern Pac. R. R. Co. vs. Freeman, 174 U. S., 379.

Horn vs. Railroad Co. (C. C. A. 6th Ct.), 54 Fed. 301.

Shatto vs. Railroad Co. (C. C. A. 6th Ct.), 121 Fed., 678.

Chicago, etc., Ry. Co. vs. Smith (C. C. A. 8th Ct.), 141 Fed., 930.

Davis vs. Railway Co. (C. C. A. 8th Ct.), 159 Fed., 10.

Chicago, etc., R. R. Co. vs. Munger (C. C. A. 8th Ct.), 168 Fed. 690.

Erie R. R. Co. vs. Schultz (C. C. A. 6th Ct.), 173 Fed., 759.

Brommer vs. Railroad Co. (C. C. A. 3rd Ct.), 179 Fed., 577.

Chicago, etc., R. R. Co. vs. Bennett (C. C. A. 8th Ct.), 181 Fed. 799.

Grimsley vs. Northern Pac. R. R. Co., (C. C. A. 8th Ct.), 187 Fed., 587.

Northern Pac. R. R. Co. vs. Alderson (C. C. A. 9th Ct.), 199 Fed., 735.

Bowden vs. Railway Co., 79 Wash., 184.

Cable vs. Railway Co., 50 Wash., 619.

Neininger vs. Cowan (C. C. A. 4th Ct.), 101 Fed. 787.

In the case of *Railroad Co. vs. Houston* (95 U. S., 697), Justice Field says (p. 702):

> "But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty

of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant."

The case of *Northern Pac. R. R. Co. vs. Freeman* (174 U. S., 379) went up on a writ of error to this court. The facts are that for several hundred feet on either side of the highway crossing there was a cut of about eight feet below the surface of the surrounding country through which the railway ran. The highway approached the crossing by a gradual decline, the length of which was from 130 to 150 feet. Along the greater portion of this distance the view of a train approaching either from the north or south was cut off by the banks of the excavation

on either side of the highway, but at a distance of about 40 feet before reaching the track the railroad emerged from the cut and the view up the track for about 300 feet was unobstructed. Plaintiff's decedent approached the crossing in a wagon drawn by two horses at a slow trot. Decedent did not stop until his wagon and team were struck. In holding that decedent was guilty of such contributory negligence as to bar a recovery, the court says:

> "So far, then, as there was any oral testimony upon the subject, it tended to show that the deceased neither stopped, looked nor listened before crossing the track, and there was nothing to contradict it. Assuming, however, that these witnesses, though uncontradicted, might have been mistaken, and that the jury were at liberty to disregard their testimony and to find that he did comply with the law in this particular, we are confronted by a still more serious difficulty in the fact that if he had looked and listened he would certainly have seen the engine in time to stop and avoid a collision. He was a young man. His eyesight and hearing were perfectly good. He was acquainted with the crossing, with the general character of the country, and with the depth of the excavation made by the highway and the railway. The testimony is practically uncontradicted that for a distance of forty feet from the railway track he could have seen the train approaching at a distance of about 300

feet, and as the train was a freight train, going at a speed not exceeding twenty miles an hour, he would have had no difficulty in avoiding it. When it appears that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken. * * * If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence. * * * Upon the whole, we are of opinion that the testimony tending to show contributory negligence on the part of the deceased was so conclusive that nothing remained for the jury, and that the defendant was entitled to an instruction to return a verdict in its favor."

In *Horn vs. Railroad Co.* (54 Fed., 301), it appears that deceased was killed at a street crossing

in the village of Utica. He was driving toward the track in a one-horse covered wagon, and failed to stop in order to ascertain whether or not the train was approaching. In holding that under such circumstances no recovery could be had, the court says (p. 206):

> "While his conduct is persuasive that he did not hear the whistle, or the coming of the train, it is clear that, had he stopped and listened, he would have heard, at least, as others did, the warning of the whistle, if not the noise of the train. Assuming the correctness of the estimated speed at 50 miles per hour, it was evidently but 75 feet from the crossing when Horn's horse halted in his walk on the side track, not eight feet from the main track. It is incredible that the decedent, if his sense of hearing was not blunted, could have failed to notice the approach of the train; and it is obvious that, if he did hear it, he must have made a fatal miscalculation as to its proximity when he urged the horse over the crossing. There is no evidence that there was anything calculated to divert his attention, prevent his hearing, or lull him into security. In short, there is nothing to extenuate the recklessness of his approach to the crossing."

In *Shatto vs. Railroad Co.* (121 Fed., 678), plaintiff was struck and injured by a train in the city of Sharon, Pennsylvania, while attempting to drive across the track, his view being obstructed by

board fences, dwelling houses, etc., until he was very near the track. The court held that plaintiff's failure to stop before driving on the track precluded a recovery and used the following language (p. 680):

> "Where the view of the track is obscured so that one's vision can be of no service in enabling him to know of the approach of a train, and the traveler is required to rely upon his sense of hearing only, it must be an exceptional case which excuses one from stopping and listening before going into the danger which may be impending without other warning than he can get from his sense of hearing. A person, under such circumstances, may not rely implicitly upon the railroad company giving proper signals before approaching the crossing, but must make use of his own faculties for self-protection."

In *Chicago, etc. Ry. Co. vs. Smith* (141 Fed., 930), it is said:

> "The law requires of one going into so dangerous a place (a railroad crossing) the vigilant exercise of his faculties of sight and hearing at such short distance therefrom as will be effectual for his protection, and if this duty is neglected and injury results, there can be no recovery, although the injury would not have occurred but for the negligence of others."

In *Davis vs. Railway Co.* (159 Fed., 10), plaintiff and a friend were driving along a public high-

way in a vehicle drawn by one horse. It is stated in the opinion that:

> "They admitted that as they approached the crossing they were engaged in general conversation, and trotted the horse to within 20 or 25 feet of the crossing before the driver slowed him to a walk. They did this when, according to their testimony, they knew that at a distance of about 30 feet from the track they could not see a train coming through the cut from the west a greater distance than 50 feet; though the actual measurement and experiments made demonstrate that 34 feet back from the track a train could have been seen at a distance of about 90 feet. At a distance of 15 feet from the crossing the proof showed that the train could be seen 232 feet."

An instructed verdict for defendant was sustained, the court saying (p. 14):

> "Judges know without evidence taken that the clatter of a horse's hoofs on a road when trotting, and a vehicle thus in motion, under the most favorable circumstances, will make such an amount of noise as will obstruct the conveyance of sounds to the ear—that they lessen the chances of hearing distinctly. And, therefore, on approaching a known place of danger at a railroad crossing, they should exercise a degree of care commensurate with the hazard to be encountered demanded of them,

and, where both the senses of vision and hearing were thus obstructed, they should take the next ordinary, practical, and sensible course of stopping to look and listen."

In *Erie R. R. Co. vs. Shultz* (173 Fed., 759), plaintiff's ward was driving a team across a railroad track in the City of Cleveland and was injured as the result of a collision with an approaching train. The negligence charged was that the railroad failed to close its gates at the crossing. In holding that it was the duty of the driver to stop before passing onto the tracks, the court says (p. 762):

"The place was one of grave danger. Trains and engines running light were frequently passing to and fro. He had a heavy load which could not be quickly moved out of the way. True, there was a string of cars standing on the dead track, which for a time would obscure his view to the east. Whether he could have seen the engine in time to have stopped after passing that obstruction, soon enough to have avoided the danger, is in fair doubt. It seems from the record probable, but not certain that he could. If he could not, it was his duty to stop and listen. But he took no care whatever. His conduct was the same as if there had been no railroad crossing there. Apparently he assumed that the gates being up, he had no need to watch. That it is incumbent on one crossing a railroad, who cannot, on account of ob-

structions, look along the track, to stop, if necessary to listen, has been often held."

In *Brommer vs. Railroad Co.* (179 Fed., 577) it appears that Brommer was driving an automobile over a grade crossing in Camden, New Jersey. He came in sight of the tracks when 170 feet distant therefrom, the street sloping toward the crossing. In stating the facts, it is said in the opinion (p. 579):

> "And, as summed up by Brommer's counsel, 'the evidence on both sides showed obstacles to vision up to within 30 or 40 feet of the track.' Actual measurements and photographs testified to by defendant's witnesses show that at a point 30 feet back from the track there was a clear view to the left down the track for 1,400 feet. But taking the estimate made in plaintiff's proof, there was a viewpoint within 30 or 40 feet of the track for 500 or 600 feet."

And further on the following language is used:

> "Now, the plaintiff, by his own showing, had a vantage point 30 or 40 feet from the track where he could have stopped and seen a train at least 500 feet away. And it is equally clear that, if he had stopped and looked, this accident would not have happened. In the Maidment Case, *supra,* we said:
>
> 'The duty of an automobile driver approaching tracks, where there is restricted vision, to stop, look, and listen, and to do so at a time and

place where stopping and where looking and where listening will be effective, is a positive duty.'

"This rule is conducive to safety, and observation and experience have deepened our conviction of its soundness. We therefore adhere to it and now restate it, and the court below was clearly right in holding it as conclusive of this case. Here, as there, the driver of the machine, when stopping, looking and listening, would have prevented the accident, made chance, not stopping, the guaranty of his safety. It will not avail to say he looked and listened as he approached the crossing, and therefore there was no call to stop, for it is manifest either that he was going at such high rate of speed as to necessitate a deep swerve to avoid striking the flagman, or if he was approaching at the slow, two-mile-an-hour rate his witness says he was, he did not look, for if he had he would have seen this train 500 feet up the track, and with his machine under control, as the witness said it was, he would have stopped. 'If a traveler,' says Wharton's Law of Negligence, quoted with approval in *Pennsylvania vs. Righter,* 42 N. J. Law, 186, 'by looking along the road, could have seen an approaching train in time to escape, it will be inferred, in case of collision, that he did not look, or, looking, did not heed what he saw.' To the same effect are authorities cited in Elliott on

> Railroads, Sec. 1165. And the presumption of the law that he did not look when he came to this 30-foot vantage point is confirmed by the proof he produced."

The decision just referred to is somewhat lengthy, but is so nearly on all fours with the case at bar that we earnestly request the court to read the opinion in full.

In *Chicago, etc., Ry. Co. vs. Bennett* (181 Fed., 799) the facts are that the plaintiff drove his wagon and team upon the railroad at a crossing in a cut about eight feet deep, and was struck and injured by a passing train. He sought to recover upon the ground that the defendant failed to ring any bell or sound any whistle to give warning of the train's approach. In holding that the defendant's motion for an instructed verdict should have been granted, the court says (p. 803):

> "But, conceding that the whistle was not sounded and the bell was not rung, these facts do not excuse the plaintiff from exercising ordinary care to protect himself from a collision at the crossing. A railroad track is a constant warning of danger. The engines and trains must run over them so rapidly that their operators cannot alone protect travelers on the highways which cross them. The law requires railroad companies to sound their whistles and ring their bells as their trains approach the crossings, and it also requires travelers on the highways to exercise ordinary care, to use efficiently

their senses of sight and hearing to prevent collisions. The failure of the servants of the companies to discharge their duties in this regard is no excuse for the failure of travelers on a highway to discharge theirs. The latter are still bound by the law to listen and look effectively before they enter upon a railroad track. * * *

Did the plaintiff faithfully discharge that duty? For 30 rods before his horses' heads came to a point one foot south of the railroad track, where he was in a position whence he could not escape the coming train, his eyes were useless, looking was futile, and he knew it. This fact imposed upon him the duty to make a more diligent use of his sense of hearing, or to stop his horses and go forward where he could see before he drove into the place of irremediable danger."

In *Grimsley vs. Ry. Co.* (187 Fed., 587), the facts are that plaintiff's intestate was killed while driving a wagon and team across the tracks of the railway in the village of Medina. The train was running at about 40 miles an hour and was not scheduled to and did not stop at the village mentioned. As the deceased approached the track, his view was obstructed by a snow fence, a grain elevator, certain box cars, and the smoke and steam from a standing engine. Notwithstanding these obstructions to his sight and hearing, he drove upon the track without stopping in order to enable him better to look

and listen. In approving a directed verdict for the defendant, the court says (p. 589):

> "The testimony shows without any dispute that from the passing track to the main track, where Grimsley was killed, the distance is some 45 feet, and for that distance there was an unobstructed view of the main track for several hundred feet to the east, except as it was obscured by the smoke and steam of the standing engine; that the obstruction so caused was not continuous, but was intermittent and temporary only, rising and falling with the wind. Giving to the plaintiff the benefit of every inference that may reasonably be drawn in her favor from the testimony, it is clear that, if Grimsley had made a reasonable effort to do so, he would have discovered the approaching train in time to have avoided a collision with it. He was in full possession of the senses of sight and hearing, and it was his duty to make reasonable use of both to ascertain if a train was approaching upon the track he was about to cross. That track was in plain view, and was in itself a warning of danger, and if his view to the east was obstructed, as it is contended that it was, it was his duty to listen, and, if necessary, to stop his team, to ascertain if he might safely cross the track in front of the mail train. Instead of doing so, he deliberately drove upon the track and to his death. The mail train was certainly approaching rapidly upon the main track, and

it seems incredible that he did not see it; and if he had stopped and listened he could not have failed to discover its presence.

"It is said that he did look to the east after crossing the passing track. But if he did, and the plaintiff's contention is correct, then he must have discovered that his view of the track to the east was obscured; and he looked at a time when it availed him nothing to do so. That made it all the more imperative that he listen, and, if necessary, stop, that he might ascertain whether or not he was in the presence of danger. That he failed to stop his team is testified by at least two of the plaintiff's witnesses. If he had stopped, it is incredible that he should not have heard the train. Admitting that defendant was negligent as charged, the conclusion is unavoidable that Grimsley was inexcusably negligent in not discovering the approach of the mail train, and that such negligence was the direct and immediate cause of his death, and will preclude a recovery by his estate or dependent relatives therefor. The case upon its facts falls within the rule held by this court in *Railway Co. vs. Andrews,* 130 Fed., 65-73, 64 C. C. A. 339."

In *Northern Pac. Ry. Co. vs. Alderson* (199 Fed., 735), which went up from the District of Washington, this court says (p. 740):

"It is undoubtedly true that travelers upon the public highway approaching a railroad

crossing where passing trains are to be expected, are required to use their senses, of both seeing and hearing, to detect the approach of such trains, and that, when the track is obscured to the sight, greater care is devolved upon them in the use of their sense of hearing, because the capacity for detecting the danger has been diminished. In listening, they must be so disposed as probably to listen effectively; otherwise, still greater care should be observed by not venturing upon the track until it is ascertained that it will be clear—especially if trains are passing frequently. *Chicago & N. W. Ry. Co. v. Andrews,* 130 Fed., 65, 73; 64 C. C. A. 399; *Chicago M. & St. P. Ry. Co. v. Bennett,* 181 Fed. 799, 104 C. C. A. 309.

"Alderson and wife say that the railroad track was obscured, by trees, brush, and weeds, from near the east end of the bridge in the roadway to within 10 or 12 feet of the track. That imposed upon them the precaution of stopping within a short distance of the track and listening for an approaching train."

It is true the court held that the case was properly submitted to the jury, but such holding was based upon the fact that there was a direct conflict in the evidence upon the question as to whether or not the driver of the wagon in which Mrs. Alderson was riding stopped for the purpose of looking and listening before driving upon the track. No such question is presented in the case at bar, since it is

admitted by Mr. Brodnix that he at no time stopped as he approached the track until he saw the train coming, when he applied his brakes at a point so near the track that he was unable to stop in order to avoid the accident.

In *Bowden vs. Walla Walla, etc., Ry. Co.,* 79 Wash., 184, the facts are that the plaintiff was driving an automobile toward a country railway crossing at a speed of about 20 miles an hour, during the middle of the afternoon on a bright sunny day. At a point 100 feet from the crossing he could have seen a car 200 feet away. At 50 feet from the crossing he could have seen a car from 250 to 300 feet away, and at 40 feet from the crossing a car 300 feet away would have been in plain sight. In holding that plaintiff was guilty of such contributory negligence as to bar a recovery, in the manner in which he approached the crossing, the Supreme Court of this state uses the following language (p. 187):

> "The driver of an automobile, approaching such a crossing as the one in this case, must make reasonable use of his senses to guard his own safety, and the failure to do so is negligence. Such a person cannot take a last look at one hundred and fifty to one hundred and seventy-five feet distance from the crossing, and then shut his eyes and go blindly forward. While we shall not attempt to say within what distance respondents should have looked for an approaching car before attempting the crossing, the law does require that such a look must

be taken within such a distance as to enable one to ascertain whether or not there is an approaching car in sight. *Beeman v. Puget Sound Traction, Light & Power Co.,* ante, p. 147, 139 Pac. 1087, and cases there cited. Had respondent taken such precaution, this accident would not have happened."

In *Neininger v. Cowan,* (C. C. A. 4th Ct.), 101 Fed., 787, the facts are that plaintiff was injured while attempting to cross a railroad track in the City of Wheeling at about five o'clock in the morning of April 23rd. He was driving a two-horse wagon, the horses trotting until he got to within fifty or sixty feet of the track, when he pulled his team down to a walk, and, without stopping, continued his course up to and upon the railroad track, where the wagon was struck by a passing train. The city ordinances of Wheeling required the railroad company to maintain a gate in charge of a flagman at this crossing. No gate and no watchman was there, however, at the time of the accident. As the plaintiff approached the tracks his view thereof was obstructed by a two-story brick building until he got within ten feet of the track, from which point he could see about sixty-four feet along the track. In sustaining a directed verdict for the defendant, the court held that although the defendant was guilty of negligence in failing to maintain gates or station a flagman as required by the city ordinances, the plaintiff himself was nevertheless guilty of such contributory negligence, in failing to

stop before driving upon the track, as to preclude a recovery, and that the trial court properly directed a verdict, saying (p. 791):

> "The track at the crossing in itself gave warning of danger. The absence of gates and the nonappearance of a flagman at that point gave significance to this warning. Entering Main Street in his wagon, he trotted his horses towards the railroad crossing until he reached a point 50 or 60 feet from it. Then he slowed down to a walk, but kept going on. His plain duty, approaching that crossing, was to stop, look, and listen. Had he, instead of going on the west side of the street, gone on the opposite side, he could have looked upon the track, up and down, before he reached the crossing. Instead of this, he selected the other side, from which his opportunity of seeing was prevented by the buildings at the corner of the crossing, and his ability of hearing distinctly was diminished by the same cause. Under these circumstances, unable to see as well as to hear, it was all the more incumbent upon him to stop. This he did not do. Something must have prevented him from hearing the train. One of his witnesses, who was on that train, whose attention was not specially called to the fact, stated that as they were approaching the crossing the engine was giving that loud, puffing noise, indicating that it was going up grade. Plaintiff did not hear this,—whether from inattention,

> or because of the noise of his moving wagon, does not appear. He did not hear. All the more was it his duty to stop. Ordinary caution would have compelled him to stop. Had he done so before crossing the track, the accident could not have happened. He went on, got on the track, and was injured. He himself contributed to the injury. The judgment of the circuit court is affirmed."

It seems to us so clear from all the evidence, not only that there was a failure to prove that defendant in error was guilty of negligence, but that Doctor Rininger and his chauffeur were guilty of such gross negligence in failing to stop in order to enable them better to ascertain whether or not a train was approaching, and in failing to look and listen at a point where looking and listening would have availed them, and in driving toward a railroad track with which they were familiar, where the view of approaching trains would be cut off by an embankment, at such a rate of speed that they were unable to stop in time to avoid a collision, after they got to a point where they could see an approaching train, that if the case had been permitted to go to the jury and a verdict for plaintiffs in error had been returned, it would have been the duty of the court to set such verdict aside. It hardly seems necessary to cite authority that where a verdict for plaintiff, if returned, should be set aside as not being supported by the evidence, the court should

direct a verdict for defendant. However, we invite the court's attention to

Schofield vs. Chicago, etc., Ry. Co., 114 U. S., 615.

Elliott vs. Chicago, etc. Ry. Co., 150 U. S., 245.

In the Schofield case it is said (p. 618):

> "It is the settled law of this court that when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict if returned must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

In the Elliott case the same rule is announced in the following language:

> "It is true that questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury; yet when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict."

In the case of *Cable vs. Railway Co.,* 50 Wash., 619, the facts are that deceased was driving toward an interurban electric railway crossing at a country station in a buggy. He did not stop before the collision, although his view of the approaching train was obstructed by certain freight cars, buildings,

cordwood and trees. The court held that the rule requiring a traveler upon a highway upon approaching a railway crossing to stop, look and listen, applies to electric interurban railways as well as to steam roads. It was also held that deceased's failure to stop, look and listen, constituted such negligence as prevented a recovery, saying (p. 625):

> "From the evidence introduced by appellants we can see no escape from the conclusion that the decedent and his daughter, one of the appellants herein, were chargeable with contributory negligence. It is the rule in this as in most states that a person about to cross a track of a steam railway must stop, look and listen, unless the conditions be such that to do so would avail nothing. The observations and experience of mankind with reference to this class of accidents have led the courts to announce and observe this rule as an appropriate measure of the degree of care and prudence necessary to relieve a person from the charge of negligence, when about to go upon so dangerous a place as the crossing of a railway. We think the same rule applies to an interurban electric railway upon which trains are customarily operated at a high speed. These people did not stop before crossing the railway track. Had they done so shortly before reaching the crossing, they could plainly have seen and heard the approaching train. If they

looked or listened, it was not at a time or place where looking or listening revealed to them the true condition of affairs. If, as contended by appellants, there were box cars or other obstructions which obscured the view until decedent and companions were within a short distance of the track, it would seem that this fact should have impressed them with the greater necessity of stopping to look and listen before emerging from behind said obstructions and going upon the track, especially as they had already seen the train coming."

The Supreme Court of this state has held that while the rule requiring one to stop, look and listen before crossing the tracks of a steam or interurban railway, does not apply to its fullest extent in the case of a pedestrian about to cross the tracks of a street railway line in a populous city, at the same time it has held that a pedestrian about to cross the tracks of a street railway and who enters heedlessly into the zone of danger, and without taking the precaution to look and listen at a point where looking and listening will avail him, in order to determine whether or not a street car is approaching, is guilty of such contributory negligence as will prevent a recovery.

If the law requires a pedestrian upon the streets of a city, who can come to an instant halt, to exercise his faculties for the purpose of ascertaining what, if any, danger there is before crossing a street

railway track, at a point where looking and listening will inform him as to the approach of a street car, certainly the driver of an automobile running at some twelve to eighteen miles an hour, in approaching a railroad crossing, over which trains run at 30 to 35 miles an hour, where his view is obscured by a bluff, should be required to exercise at least as high a degree of care as that demanded of a pedestrian before crossing a street railway track.

Helleisen vs. Seattle Electric Co., 56 Wash., 278.

Fluhart vs. Seattle Electric Co., 65 Wash., 291.

Steuding vs. Seattle Electric Co., 71 Wash., 476.

Bardshar vs. Seattle Electric Co., 72 Wash., 200.

Since the bluff on the left of the county road would obstruct the view of one approaching the tracks from the west until within a comparatively short distance thereof, a greater degree of vigilance and caution was required of Doctor Rininger and his chauffeur than would otherwise have been the case.

Chicago, etc. Ry. Co. vs. Andrews (C. C. A. 8th Ct.), 130 Fed., 65.

Garlich vs. Railway Co. (C. C. A. 8th Ct.), 131 Fed., 837.

Neininger vs. Cowan (C. C. A. 4th Ct.), 101 Fed., 787, 792.

Shatto vs. Railway Co. (C. C. A. 6th Ct.), 121 Fed., 678.

Garrett vs. Railway Co., 126 Fed., 406.

Stowell vs. Railway Co. (C. C. A. 2nd Ct.), 98 Fed., 520.

Davis vs. Railway Co., 159 Fed., 10.

Counsel attempt to explain the great length of the skid marks upon the road by suggesting that it was rendered slippery from an application of tarvia. That the road was in fact dry and dusty and offered an excellent resisting surface, we think has been shown beyond question.

Mr. Overlock testified that he was there at the time of the accident, saw the skid marks, that there was no pitch, and that the tracks where the automobile had slid showed in the dust. (Rec. 124.)

Mr. Rosenberg, who saw the skid marks immediately after the accident, testified that the road was dry and dusty; that the tires of the automobile had raked off the greyish dusty surface and appeared to have burned the surface of the road by taking off the grey surface and leaving the brown skid marks on the road. (Rec. 146.)

Mr. De Jarlius testified that he was familiar with this road crossing during the latter part of July, 1912, and at that time the road was in fairly good condition, with the exception of bumps, rough in some places due to the road being worn; that the road at this point is only slippery when it is raining, which is true of all asphalt roads. (Rec. 176.)

Mr. Morris, a witness for plaintiffs in error, who

reached the scene of the accident shortly thereafter, testified that the road was dry; that there was not much dust at this particular place, and that the roadbed was pretty solid. (Rec. 231.)

Mr. Morrison testified that he had been a civil engineer for thirty years, and during the year 1912 was county engineer of King County; that he was familiar with the construction of the county road at Riverton; that it is a macadam road, having a base of 4 or 5 inches in thickness made of crushed rock 1½ to 3 inches in dimensions, over which a layer of finer stone is laid, a steam roller being then passed back and forth over the surface; that he had charge of repairing the road in the spring and summer of 1912; that the 100 feet west of the tracks, including other portions of the road, was swept clean of all dust, all ruts were loosened up and new rock placed therein; that a coat of hot tarvia was then brushed over the surface, which was afterward covered with a layer of rock screenings; that a few hours after the tarvia is applied it hardens and produces with the screenings a layer which might be compared to the sole of a shoe; that tarvia makes a perfect bond between the surface of the road and the rock screenings placed on top, which are thoroughly held and imbedded in the tarvia; that such a road offers good friction and the surface is a little rougher than the sheet asphaltum paving found in cities; that the road for 100 feet west of the track is a good one, was treated with tarvia and rock screenings in May, 1912; that during the whole

season a man was detailed once a day to pass over the road and apply a new coat of rock screenings to all places where the tarvia showed signs of coming to the surface, and that all of this work was done under his direct supervision. (Rec. 188 to 190.)

It seems to us, therefore, manifest that the distance the automobile skidded was due to the reckless rate of speed at which it was being driven, and not to any slippery or defective condition of the roadbed.

A few exceptions to the reception and rejection of testimony were preserved, but since no authority has been cited in their support, and they do not appear to have been urged with any degree of confidence in the brief, we will not impose upon the court further by discussing them.

We earnestly insist that upon the entire record it affirmatively and conclusively appears that defendant in error was not shown to have been guilty of any negligence; that Doctor Rininger and his chauffeur were guilty of such gross and reckless carelessness as will bar a recovery, and that the judgment should therefore be affirmed.

Respectfully submitted,

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